The FCC claims that Congress followed the same model it had adopted in the Cable Act of 1992. Id. But the Cable Act proves our point, not the FCC's. Like the 1996 Act, the Cable Act directs the Commission, within 180 days, to prescribe regulations to carry out its responsibilities under the Act. 47 U.S.C. § 543(b)(2). Unlike the 1996 Act, however, the Cable Act also assigns the Commission substantive jurisdiction over the rates to be charged by cable systems. The Cable Act provides that "[t]he Commission shall, by regulation, ensure that [cable] rates . . . are reasonable," § 543(b)(1), and it enumerates seven "factors" that the FCC is required to "take into account" in prescribing its rate regulations, § 543(b)(2). Also unlike the 1996 Act, the Cable Act expressly directs State regulators to follow the FCC's rate regulations: "the rates for the provision of basic cable service shall be subject to regulation by a franchising authority . . . in accordance with the regulations prescribed by the Commission." § 543(a)(2)(A) (emphasis added).[4]

These provisions of the Cable Act thus bring sharply into focus the missing links in the FCC's statutory argument. The 1996 Act assigns the FCC no substantive pricing jurisdiction. Instead, Congress entrusted entirely to State commissions the responsibility for determining "just and reasonable" interconnection rates. Nor does the 1996 Act require

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[4] The same is true of the dual regulatory schemes cited by AT&T. AT&T Br. 38-39 & n.17. When Congress has wanted to limit the States' role to following the rules of a federal agency, it has done so in explicit and unambiguous terms. See, e.g., Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3(a), (f) (Federal Energy Regulatory Commission shall issue rules regarding rates, and "each State regulatory authority shall . . . implement such rule[s]"); Clean Water Act, 33 U.S.C. § 1314(i); Clean Air Act, 42 U.S.C. § 7661a(d); Resource Conservation Recovery Act, 42 U.S.C. §§ 6901, 6941, 6942; Safe Drinking Water Act, 42 U.S.C. § 300f et seq. Congress's deliberate omission of any such directive here confirms that it chose not to subject State ratemaking to FCC control.

States to follow any FCC rate rules. On the contrary, in the bifurcated section 252(c), Congress went out of its way to specify separately that States are to set rates only "according to subsection (d)," which in turn sets forth the statute's pricing standards with no mention at all of FCC regulations.[5]

Nor can the holes in the FCC's textual argument be filled with its grab bag of general rulemaking provisions. It cannot be inferred solely from an agency's general rulemaking power, without a specific grant of statutory jurisdiction, that Congress intended the agency to intrude upon the traditional province of the States. In California State Bd. of Optometry v. FTC, 910 F.2d 976 (D.C. Cir. 1990), for example, the court held that, in the absence of clear statutory language expanding the FTC's substantive jurisdiction, the agency's broad rulemaking authority did not empower it to "alter the usual balance between the Federal Government and the States" by "declaring that certain state laws constitute unfair acts or practices." Id. at 982. That rule has added force here given the jurisdictional rule of section 2(b). Moreover, none of the general rulemaking provisions on which the FCC relies —

[5] The FCC wrongly assumes that rates are among the "open issues" to be resolved under section 252(c)(1). FCC Br. 34. If that were so, Congress would have had no reason to instruct States separately in subsection (c)(2) to establish rates under the standards of subsection (d). Under the FCC's theory, since States would be required by subsection (c)(1) to follow the Commission's regulations, and since those regulations themselves would incorporate the standards of subsection (d), FCC Br. 34, 36, subsection (c)(2) would be entirely redundant. That construction is plainly impermissible. See United States v. Lamere, 980 F.2d 506, 513 (8th Cir. 1992) ("Where language is included in one section of a statute but omitted in another section of the same statute, it is generally presumed that the disparate inclusion and exclusion was done intentionally and purposely.").

sections 201(b), 4(i), and 303(r) of the 1934 Act, and section 251(d)(1) of the 1996 Act — remotely supplies the substantive jurisdiction the agency has asserted.

According to the FCC, "[s]ection 201(b) is the most directly applicable . . . general grant[] of authority" that purportedly gives the FCC jurisdiction with respect to the local competition provisions of the 1996 Act. FCC Br. 23. The FCC is leading with its chin. Section 201, by its plain terms, is limited to "<u>interstate or foreign</u> communication" services. 47 U.S.C. § 201(a) (emphasis added). The FCC claims that, while section 201<u>(a)</u> is limited to "interstate" communication services, section 201<u>(b)</u> is not. But section 201(b) refers to "<u>such</u> communication service," and the "such" plainly refers only to the "<u>interstate or foreign</u> communication" mentioned in the immediately preceding sentence in section 201(a).

Nor does section 4(i) advance the FCC's position. It is merely a generic "necessary and proper" clause empowering the FCC to execute the substantive authority granted elsewhere in the statute; it confers no added jurisdiction itself. <u>California v. FCC</u>, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); <u>AT&T v. FCC</u>, 487 F.2d 865, 877 (2d Cir. 1973). The same is true of section 303(r), which applies "except as otherwise provided in this Act" (47 U.S.C. § 303) and which appears in Title III of the Act: "Provisions Relating to Radio." Neither of these provisions can take precedence over the allocation of pricing authority in section 252 or the jurisdictional rule of section 2(b).

Nor does section 251(d)(1) of the 1996 Act fill this crucial void. Like the analogous Cable Act provision (47 U.S.C. § 543(b)(2)), section 251(d)(1) merely directs the FCC expeditiously to adopt regulations implementing the limited responsibilities expressly assigned to it elsewhere in section 251. It does not assign any such responsibilities itself — nothing in section 251(d)(1), in other words, corresponds to the Cable Act provisions (47 U.S.C. §§ 543(b)(1), (3)), which expressly assign the FCC jurisdiction over cable rates. Instead, section 251(d)(1) is a procedural provision that cannot bear the substantive weight the FCC rests upon it.

Unable to discern a straightforward textual basis for its expansive jurisdictional claims, the FCC is driven to assert that section 251(d)(3) — which provides that the Commission "shall not preclude the enforcement" of any State access or interconnection regulation consistent with section 251 — necessarily "assumes" in some mysterious way that the Commission has jurisdiction over intrastate access and interconnection. FCC Br. 25. But this anti-preemption provision actually contradicts the FCC's claim. It presumes that the States, not the FCC, have authority to adopt intrastate access and interconnection regulations, and it specifically protects those State regulations against FCC preemption.

B. The FCC Cannot Avoid the Application of Section 2(b), and Even If It Could, the 1996 Act Still Assigns Pricing Jurisdiction to the States

The FCC and its supporters next launch a series of attacks on the jurisdictional bar of section 2(b) of the Communications Act. Their arguments fail on every count. But even if section 2(b) did not affirmatively prohibit the FCC's assertion of intrastate jurisdiction, the 1996 Act would independently foreclose its attempt to seize the pricing jurisdiction allocated expressly and exclusively to the States.

1. The Commission's principal contention — made for the first time in its brief to this Court — is that section 2(b) has no application here because the requirements of sections 251 and 252 "involve facilities and equipment that carry both interstate and intrastate traffic," and the FCC automatically has "exclusive authority," "section 2(b) notwithstanding," to regulate "practically inseparable dual-use facilities and equipment." FCC Br. 29. Because the FCC did not rely on this so-called "inseparability" theory in its Order, and made none of the findings necessary to sustain such a theory, it cannot properly invoke the argument in this Court. "[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983). In any event, the assertion is riddled with flaws.

First, the argument proves too much. Under its logic, the FCC would have had jurisdiction to impose all of the intrastate regulations at issue in this case, based entirely on its jurisdiction over interstate communications, even before Congress adopted the 1996 Act.

Second, the Supreme Court rejected essentially the same radical application of the inseparability theory in Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986). The FCC there sought to preempt State depreciation rules and to substitute its own nationally uniform depreciation rules on the theory (echoed almost verbatim here) that the telephone equipment at issue was used for both interstate and intrastate calls and that "it makes no sense within the context of the Act to depreciate one piece of property two ways." Id. at 375. But, observing that "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service" (id. at 360 (emphasis added)), the Court refused to "confine[]" State regulation (as the FCC asks this Court to do) "to intrastate matters which are separable from and do not substantially affect interstate communication" (id. at 373 (internal quotation marks omitted)).

After Louisiana PSC, the courts of appeals have consistently rejected similar FCC arguments in other contexts. The settled rule is that preemption may "not be justified merely by the dual intrastate and interstate aspects of [a particular service]; the FCC [has] to show that it [can]not separate the interstate and intrastate components of its regulation." Public Utility Comm'n of Texas v. FCC, 886 F.2d 1325, 1333 (D.C. Cir. 1989) (emphasis added); see also Public Serv. Comm'n of Maryland v. FCC, 909 F.2d 1510, 1516 (D.C. Cir. 1990). To invoke this very limited exception, moreover, the FCC must also demonstrate "with some specificity" that a State's exercise of its authority over intrastate communications necessarily "negates the exercise by the FCC of its own lawful authority over interstate communications." NARUC v. FCC, 880 F.2d 422, 429, 430 (D.C. Cir. 1989) (emphasis added); see also California v. FCC, 905 F.2d at 1243. No such showing has been made here.

As for the FCC's claim of pricing jurisdiction, its reliance on an inseparability theory is futile in any event. The Act, by its plain terms, assigns pricing exclusively to the States, and no inseparability analysis can override that congressional judgment. Whether the FCC can justify the non-price aspects of its regulations under the controlling standards depends on factual inquiries that the Commission has yet to conduct and that this Court cannot review unless and until the Commission chooses to proceed on that basis upon remand.

Third, the 1996 Act adds new barriers to the Commission's reliance on such a theory. Section 261(b) provides that "[n]othing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment . . . or from prescribing regulations after [the] date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." And section 251(d)(3) prohibits the FCC from preempting any such State regulation that establishes access or interconnection obligations, if it "is consistent with the requirements of this section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part." The effect of these two provisions is to protect even those State access and interconnection regulations that might otherwise have fallen within the FCC's preemptive reach under the inseparability exception.[6]

2. As we showed in our opening brief (at 23-24), Congress's deliberate refusal to amend section 2(b) fortifies the conclusion that the provision continues to bar FCC jurisdiction over intrastate matters not expressly assigned to it by the 1996 Act. The Conference Committee removed from the House and Senate bills language that would have excepted "part II of title II" from the reach of section 2(b). As a result, section 2(b) applies with full force to the interconnection and access provisions, and the FCC therefore may not "construe" any provision of the 1996 Act to give it jurisdiction over intrastate rates, services, or facilities.

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[6] Nor would it be sufficient for the FCC to declare "generically," as intervenors audaciously suggest, that any State regulations that depart from the FCC's own regulations are automatically "inconsistent [with] and substantially prevent implementation of the requirements of § 251." AT&T Br. 40. That approach would vitiate section 251(d)(3), leaving the FCC free to preempt anything and everything in its path.

The Commission is therefore forced to argue that the Conference Committee's action should be disregarded as a "non-substantive change." FCC Br. 33. Its theory does not hold water. While the Conference Report did not specifically discuss the decision to strike the amendment to section 2(b), that does not mean that the deletion was a "minor drafting [or] 'clerical chang[e].'" AT&T Br. 44. The Committee made clear that the changes not discussed included, in addition to minor drafting and clerical matters, "conforming changes made necessary by agreements reached by the conferees." S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996) ("Conference Report"). As we explained in our opening brief, the Committee made a number of jurisdictionally significant substantive clarifications to the Act's interconnection provisions, including the creation of a new section 252 expressly allocating pricing jurisdiction to the States and removing ambiguous language that might have been read to require States to follow FCC pricing regulations. Both the restructuring of these provisions and their new terms were discussed in the Conference Report (at 117-26). It was inevitable in light of those clarifying changes that the proposed amendment to section 2(b) would have to be removed as a "conforming change" to reflect the agreements reached by the conferees.[7]

The intervenors would have this Court close its eyes to the Conference Committee's action on the theory that a Committee's unexplained change in legislation cannot support a

[7] AT&T's reliance on the Standing Rules of the Senate (AT&T Br. 43-45) is misplaced. Even if a conforming change could ever violate Rule XXVII.2's procedural bar on conferees' striking "matter" agreed to by both Houses, the express and only remedy for a violation of that rule is by a Senator's point of order. If no point of order is made, any objection is waived.

"negative inference." AT&T Br. 45. But the cases they cite rejected inferences contrary to the plain language of the enacted statute.[8] Here, by contrast, the Conference Committee's changes reinforce the Act's plain meaning, and it is only by disregarding those changes that the FCC can justify its distorted reading of the statute.

C. "Practical Considerations" Cannot, and Do Not, Justify the FCC's Disregard of the Act's Jurisdictional Allocations

In the end, the FCC is reduced to arguing as if it were addressing Congress. But the "practical considerations" that it invokes in support of its preferred outcome (FCC Br. 38-41) cannot trump the statute's express allocation of jurisdiction. As the Court in Louisiana PSC made clear, the FCC has no license to preempt State regulation in violation of section 2(b) merely because it believes that its own uniform national rules "will best effectuate [the] federal policy" (476 U.S. at 374).[9]

In any event, the FCC is mistaken about the direction in which the relevant "practical considerations" cut in this case. According to the FCC, it (not the States) must have jurisdiction over "pricing-related terms" because those terms require a single limiting

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[8] See Trailmobile Co. v. Whirls, 331 U.S. 40, 60-61 (1947) ("literal construction of the statute" is "not weakened by the Government's strained and unconvincing citation of the Act's legislative history"); Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945) (relying on "plain words and meaning"); Drummond Coal Co. v. Watt, 735 F.2d 469, 473 (11th Cir. 1984) (relying on "plain meaning").

[9] As the D.C. Circuit has put it, in terms that apply with full force here, "the FCC may not preempt solely because state regulation of a matter of primarily local interest (which directly impacts on rates for intrastate services) conflicts with its ideas of sound federal economic or regulatory policy." Public Serv. Comm'n of Maryland v. FCC, 909 F.2d at 1516.

construction. FCC Br. 39. The premises of this argument are that the Act's critical "pricing-related terms" (namely, "just and reasonable" rates based on an incumbent LEC's "costs") do not themselves confer discretion, that they may be applied in only one acceptable way, and that the FCC alone knows what that is. That is simply wrong.

Congress no doubt recognized that the task of determining "just and reasonable" rates is a difficult balancing act that requires informed consideration of competing objectives based on myriad local factors. Specifically, it requires balancing, first, Congress's directive to open the markets for local service to competition; second, Congress's equally important mandate that all new entrants "contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State[,] to the preservation and advancement of universal service," 47 U.S.C. § 254(f); and third, the constitutional requirement that LECs not be deprived of their property without just compensation. It also necessarily depends on such quintessentially local factors as the extent to which the LEC remains obligated to subsidize below-cost residential service and the history of the State's regulation of the LEC's existing network (including the rate of depreciation). Not surprisingly, therefore, Congress determined that the States, not the FCC, would be in the best position to evaluate and balance these local considerations.

D. CMRS Warrants No Special Jurisdictional Treatment

A group of CMRS providers seek special dispensation from the applicable jurisdictional rules. They claim that section 332 gives the FCC an independent source of incumbent may be reduced essentially to a supplier of labor and construction services for new entrants and can be required to devote its resources at the whim of competitors to modify its network and recombine elements in any and every manner that is "technically feasible." As long as the entrant is willing to pay, according to the FCC, anything goes. This wholesale subordination of the incumbent LEC's operations to the needs of competitors, however, is not the system of competition envisioned in the Act.

4. The FCC Provides No Justification for Its Failure To Respect Third Party Property Rights in Requiring Unbundling

To avoid LEC claims that its rules will infringe third party property rights, the FCC primarily contends that the claims are not supported by substantial evidence. See FCC Br. 98. But this is not a claim that depends on the weight of any evidence. There is no dispute that the rules will require LECs to make licensed intellectual property available for entrants regardless of the terms of the licensing arrangements. The FCC's dictates thus will inevitably infringe third parties' property interests and compel LECs to violate terms of their contracts with licensors.

C. The FCC Provides No Justification for Allowing Entrants To Use Unbundled Elements To Evade the Statutory Restrictions on Resale

The FCC's first argument in favor of allowing entrants to use unbundled elements to obtain finished services from incumbents aptly highlights the FCC's errors in approaching the Act. According to the FCC, "the Act does not impose any limitations on carriers' ability to obtain access to unbundled network elements." FCC Br. 100 (quotation marks omitted, emphasis added). From that sweeping and erroneous proposition, the FCC glosses over every indication from the text and structure of the Act demonstrating that Congress did not intend to allow unbundled elements under section 251(c)(3) to be used as an alternative route for purchasing finished services.

For example, the FCC claims that since section 251(c)(3) provides for entrants to "combine" elements, there must be no limits on "recombining," even if an entrant merely uses elements to reconstruct completed services. FCC Br. 102. But that assertion ignores the fact that the entrant undertakes no "combining" of elements whatsoever when it obtains a finished service. As a result, the FCC provides no textual basis at all for transforming a section addressing the piecemeal provision, "on an unbundled basis," of discrete parts of the LEC's network into a provision allowing entrants to obtain — at the prices prescribed for unbundled elements — the fully integrated services that a LEC provides to its own end users.

Moreover, the FCC disregards the fundamental structure of the Act. By defining a specific route for obtaining an incumbent's services for resale in section 251(c)(4) and imposing distinct restrictions on resale (see §§ 252(d)(3), 271(e)), Congress made it plain that the provisions concerning unbundling in the Act were not meant to be stretched to create an alternative method for obtaining finished services free from those restrictions.

Along similar lines, the FCC fails to justify unbundling specific services, such as vertical features. The FCC's only effort to support this requirement is its own speculation that, if it did not require unbundling of "services," LECs might try to characterize all pieces of their networks as "services" and thereby avoid unbundling altogether. See FCC Br. 103. This plainly unrealistic hypothetical concern provides no reason for unbundling services, especially when Congress eliminated language from an earlier version of the Act that would have accomplished that end. See Opening Br. 66.

The FCC and AT&T also avoid addressing the grave practical concerns that prompted the statutory distinctions between unbundled elements and resold services in the first place. AT&T attempts to divert attention by charging LECs with an effort to preserve "supracompetitive" prices. AT&T Br. 75. But if one strips away AT&T's pejorative rhetoric, it is plain exactly who is trying to take unfair advantage of the regulatory scheme: under the FCC's approach, competitors who obtain LECs' own services at cost-based rates can instantly undercut LECs' service prices due solely to an opportunity for regulatory arbitrage created by the FCC's Order and never contemplated by Congress. See Opening Br. 67-68.

Congress clearly recognized this problem, moreover, when it imposed a distinct pricing standard on resold services by requiring prices based on the LEC's own retail rates rather than its costs. See § 252(d)(3); cf. H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, at 72 (1995) ("The [resale] rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services . . . ."). While AT&T attempts to portray section 254, which requires all carriers to support universal service, as a panacea for concerns about arbitrage, see AT&T Br. 76, that claim is unavailing. Congress wisely recognized that an entrant that merely resells an incumbent's own service must incorporate into its price structure the same system of subsidy supports included in the incumbent's own retail rates.

Any other rule would inevitably provide unwarranted opportunities for entrants to undercut incumbents' prices simply by exploiting variations in the regulatory system.

Congress similarly imposed other restrictions on resale to ensure fair treatment under the Act. Thus, Congress prohibited interexchange carriers who resell RBOC local service from jointly marketing their interexchange service with the RBOC's resold local services until the RBOCs themselves obtain authority to enter the interexchange business. See § 271(e). Neither the FCC nor AT&T provides any rationale for allowing entrants to avoid these restrictions merely by purchasing finished services under the elaborate fiction of "unbundling" and "rebundling" an end-to-end set of network elements.

IV. THE FCC FAILS TO JUSTIFY THE ORDER'S INCONSISTENCY WITH THE STATUTORY REGIME OF PRIVATE NEGOTIATION

Recognizing that its default proxy prices and "pick-and-choose" rule are inconsistent with a regime of individually negotiated agreements, the FCC is forced to deny that Congress sought to establish such a regime in the first place. Instead, the FCC claims that "the Act confines negotiations to a brief initial period, giving priority to arbitrations." FCC Br. 115.

That gets the statute exactly backwards. The Act puts private negotiations at the center of the transition to competition, and provides for arbitrations only as a backstop to resolve any issues on which the parties fail to agree. A carrier cannot even request arbitration until it has complied with its explicit statutory duty to negotiate in good faith for a minimum of 135 days. 47 U.S.C. §§ 251(c)(1), 252(b)(1). And negotiations are not "confined" to that period, but may continue without state intervention as long as the parties

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US OFFICE PRODUCTS

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF ERNEST G. JOHNSON, DIRECTOR OF THE PUBLIC UTILITY DIVISION, OKLAHOMA CORPORATION COMMISSION TO EXPLORE THE REQUIREMENTS OF SECTION 271 OF THE TELECOMMUNCATIONS ACT OF 1996	) CAUSE PUD NO. 970000064

FILED
APR 28 1997
C... CLERK'S OFFICE - OKC
...ORATION COMMISSION
OF OKLAHOMA

TRANSCRIPT OF PROCEEDINGS

APRIL 23, 1997

OFFICIAL REPORTER:

LYNETTE H. WRANY, C.S.R.

have gotten back we believe are excessive.

CHAIRMAN GRAVES: So you don't feel like though that just given on the base of the price quote that you could go to the Commission and say, look, this is outrageous on its face, they're not dealing in good faith?

WITNESS CADIEUX: That might be a theoretical - - Theoretically, we might have had that opportunity. But there a - - that - - I mean, this is a judgment we make every day in terms of will doing that, you know, we have been pushing the process, pushing the process.

CHAIRMAN GRAVES: Right.

WITNESS CADIEUX: And, you know, we are getting - - we think we are getting close on some of these collocations. And, you know, we think the process may be running a little smoother now that we have gone through this first batch and done this for the first time. But it is always the judgment do you muddy the waters from the business standpoint and shoot yourself in the foot by going to the regulator at any point in time, or incrementally are you better, you know, pushing - - pushing the process, you know, a little further to completion.

CHAIRMAN GRAVES: Right. And so what I have been hearing all along is a very real sense of frustration that we just can't get there because the incumbent is not working with us. And my concern is, if there is not an ability to provide relief if there is some egregious behavior, then we need to provide some relief. But if there is a business decision that's being made not to pursue an option, where does that come into the overall process that, well, it is just kind of a value judgment that I make every day in a business setting. And sometimes I err on the side of being aggressive, other times I'm going to lay back a little bit and kind of see how it shakes out, because it may work smoother once we get through one, or two or three of these.

WITNESS CADIEUX: There is a couple of things that I want to respond to. I'm losing the track here.

Well, and the second part of it, I think you are alluding to the resell side of it. Is that what you are - - in terms of why not get in on the resell business?

CHAIRMAN GRAVES: No. No. No. No. Not at all. I'm just saying that we have heard from several people here that there is - - the suspicion is that the problems and the timing that they have run into in terms of either negotiating these things or actually once you have got an interconnection agreement kind of physically going through settling out of these location problems, and so forth, that there is an unspoken sense out there that there is some sort of game playing going on that because they're the incumbent they're trying to keep me out, they're just going slow, 1w-117

okay?

Now and my question is, if that is really going on and you believe that there is an option here at the Commission, why aren't people coming in here saying, look, let's deal with it. What I thought I heard you say was that, well, there is a business choice that sometimes needs to be made to say do I go stir up the waters at the Commission and get the regulators mad and potentially make them so angry that they just stop on everything else and force me to go there every step of the way, or is this thing going to kind of work out and run smoother and on a relative basis I'm actually better off kind of negotiating it through. And that is what I'm trying to get my hands at, because if that is the business decision that is being made, we don't have a place, we don't have a role to play. If there is not the ability to effect some cooperation and we can't incent people to the proper behavior because we don't have a mechanism or we haven't stated that we think we have the authority and we ought to do it, then we need to kind of clarify that. But I'm concerned that people may be out there thinking they don't have the ability to go - - they don't have any other alternatives other than to just kind of sit there and take whatever comes across the table.

WITNESS CADIEUX: I want to be really clear about this. I mean, to the extent there is a suggestion that Southwestern Bell is just flat out not working with us, that is not the case.

CHAIRMAN GRAVES: Okay. All right.

WITNESS CADIEUX: You know, I'm sure their view of it is, well, Brooks you should have been more precise in terms of the type of information you provided, and, you know, so they think it is our fault on collocation. I mean, they're working with us. We have found the process - - You know, now looking back, having gone through the first batch over these last six to nine months, we have found the process, at least as it initially worked, as very cumbersome because it was very non-interactive in our view. And, you know, I think on - - my sense of it is from talking to our collocation people, we think that it is getting better on the new applications we are putting in.

CHAIRMAN GRAVES: Because there is a better understanding of what is necessary?

WITNESS CADIEUX: There is better understanding of what is necessary. And we learned, to some extent, we learned the game. You know, we understand, okay, if we - - you know, if we want X, we better be very, very specific about X. And we didn't - - You know, that wasn't made clear to us, wasn't apparent to us in some situations.

CHAIRMAN GRAVES: It is kind of like dealing with lawyers. They only answer the question asked?

WITNESS CADIEUX: Well, that is fair. But - - I missed another piece on this. But the point is, we are - - I mean, I want to try to make this clear. On the one hand you may say, well, it sounds like there is all sorts of problems. Well, we think there are some problems. But why are you hearing about this? I mean, absent this petition, and absent a Southwestern Bell application to be getting into the interLATA market today, the judgment I think from Brooks probably would be, look, we have spent more time in the process than we thought was necessary. We think in large part that is not our fault. We think the prices are excessive. We have a business imperative. A facility-based carrier, a new entrant facility-based carrier, is under unique financial business pressure. So you have got to get into the market. We have to make decisions all the time. We would love to arbitrate some of these cases. But if we had arbitrated - - I mean, a good example is where Brooks is right now. We signed an interconnection agreement around Labor Day. And we are in this process. We started our switch up in January. We started to turn up a little bit of service. But getting these collocations done is a critical element because of our fiber ring network to get out and get a broader reach to customers.

If we had arbitrated, and fought, and come to the regulator in the prescribed - - you know, because we didn't think the prices were reasonable, my guess is we would be - - and this is exactly what I have - - you know, I pat myself on the back, because last spring everybody said nine months, it is just nine months and you are done. And I said, whoa, nine months until you get an arbitration decision. How long until you actually have an interconnection agreement that you can provide service? In fact, you can start connecting your networks and go through the process and then maybe be able to provide service four or five months down the record. And if we had chosen that route here in Oklahoma and been in the same situation that AT&T is in terms of procedurally, you know, we would be - - the financial picture for us in Oklahoma would be very bleak.

CHAIRMAN GRAVES: But that speaks volumes for the relative business plans and the relative market position, if you will, of the two companies, and that you made a business decision based upon what worked for you all versus what might have worked for someone else.

WITNESS CADIEUX: I understand. But to us it is not a business decision. It is a business necessity and business imperative.

COMMISSIONER GRAVES: Well, I understand.